

SUPPLEMENTAL REMARKS

The Office Action mailed November 9, 2009 rejected claims 17, 18, 21-25 and 28 based on nonstatutory double patenting and cited to U.S. Patent Number 7,328,034 and Yamada. The following remarks are provided in addition to the remarks filed on May 7, 2010.

It is respectfully submitted that this double patenting rejection was impermissible and should be withdrawn.

MPEP 804 notes:

A double patenting rejection of the obviousness-type>, if not based on an anticipation rationale,< is "analogous to [a failure to meet] the nonobviousness requirement of 35 U.S.C. 103" **except that the patent principally underlying the double patenting rejection is not considered prior art.** *In re Braithwaite*, 379 F.2d 594, 154 USPQ 29 (CCPA 1967).


In this case, the Office Action has rejected claims 17, 18, 21-25 and 28 based on 7,328,034, which should not have been considered prior art, in combination with Yamada. It is respectfully submitted that the double patenting rejection of the instant Office Action was a disguised attempt to get around the requirements of 35 U.S.C. § 103(a) because MPEP 804 clearly states that 7,328,034 should not have been considered prior art.

Therefore, it is respectfully submitted that the double patenting rejection was impermissible and should be withdrawn.

Respectfully submitted,

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